

Electoral Counts—Selection of President and Vice President

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Research References

3 Hinds §§ 1911–1980
6 Cannon §§ 438–441
3 Deschler Ch 10
U.S. Const. amend. XII

§ 1. In General; Election of President by House

Both the House and Senate formally participate in the process by which the President and Vice President are elected. Congress is directed by the Constitution to receive and, in joint session, count the electoral votes certified by the states. If no candidate receives a majority of the electoral vote, the House is directed to elect the President, while the Senate is directed to elect the Vice President. U.S. Const. amend. XII. *Manual* § 219.

The House has on two occasions, in 1801 and 1825, proceeded to elect a President where no candidate had a majority of electoral votes. 3 Hinds §§ 1983, 1985. Both Thomas Jefferson and John Quincy Adams were chosen after prolonged debate and repeated ballots in the House. Under both the original constitutional provision and the 12th Amendment, balloting was by states, with each state having one vote.

There have been rare instances in which the result of the electoral vote has differed from the result of the popular vote. See, for example, 3 Hinds §§ 1953–1956. Generally, however, the electoral vote has followed the popular vote because of the manner in which electors are chosen under state law. Deschler Ch 10 § 1.

Under the electoral college system, the electors prepare certified lists of all persons voted for as President and Vice President. The certificates are transmitted to the seat of government and directed to the President of the Senate. U.S. Const. amend. XII. Certificates identifying the electors are prepared and transmitted pursuant to statute (3 USC § 6).

Under earlier procedure bills relating to the electoral vote count were considered of high constitutional and parliamentary privilege. 3 Hinds

§ 2578. Resolutions relating to the method of examining the electoral votes (3 Hinds § 2573) or to procedural irregularities (3 Hinds § 2576) or fraud (3 Hinds § 2577) in connection therewith, were also considered as privileged. Following enactment in 1948 of a law (3 USC §§ 15–18) governing the counting of electoral votes in Congress, these precedents became largely obsolete since a mechanism exists to address those procedures.

§ 2. Joint Sessions

The House and Senate meet in joint session to count the electoral vote. 87–1, Jan. 6, 1961, p 277; 93–1, Jan. 3, 1973, p 30; 97–1, Jan. 5, 1981, pp 192, 193. The joint session is provided for by concurrent resolution which merely ratifies the requirement in law for a joint session on January 6 at one o'clock p.m. to count the electoral vote. Deschler Ch 10 § 2.1 (form); 91–1, Jan. 3, 1969, p 36. This resolution is considered as privileged. 3 Hinds §§ 2573–2577; 97–1, Jan. 5, 1981, p 114. The resolution sets forth the provisions of the United States Code (3 USC § 15) which specify the procedures to be followed. These provisions are in effect a joint rule of the two Houses for the occasion and apply in the joint session and in the event they divide to consider an objection. 91–1, Jan. 6, 1969, pp 145–147, 169–172.

The Speaker may be authorized to declare a recess in connection with the joint session (Deschler Ch 10 § 2.2) and he may decline to recognize for one-minute speeches or extensions of remarks before recessing for that purpose (Deschler Ch 10 § 2.3; 91–1, Jan. 6, 1969, p 145).

§ 3. Consideration and Voting

Generally

A joint session to count the electoral votes is presided over by the President of the Senate (3 USC § 15). In his absence, the President pro tempore of the Senate presides and calls the session to order. Deschler Ch 10 § 2.5. The electoral votes are counted by tellers (Deschler Ch 10 §§ 3.1–3.4) who have been appointed on the part of the House by the Speaker (87–1, Jan. 3, 1961, p 26; 89–1, Jan. 4, 1965, p 26; 95–1, Jan. 6, 1977, p 312) and on the part of the Senate by the Vice President (87–1, Jan. 4, 1961, p 72). The certificates of votes given by the electors are opened by the President of the Senate and handed to the tellers, who read them in the presence and hearing of the two Houses. Deschler Ch 10 § 1.

The certificates and other papers relating to the electoral count are presented and acted on in alphabetical order by states (3 USC § 15). Where certificates have been received from both the Democratic and Republican

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slates of electors from a state, and each slate purports to be the duly appointed electors from that state, the Vice President presents the certificates, with all attached papers, in the order in which they have been received. 87–1, Jan. 6, 1961, p 288.

Where there are conflicting electoral certificates from the same state, the two Houses meeting in joint session may by unanimous consent determine which certificate is to be accepted as valid; and the tellers may then be directed to count the votes in the certificate deemed valid. 87–1, Jan. 6, 1961, pp 288–291.

Objections

In the event that a timely objection in proper form is raised in connection with the count, the joint session divides, the objection to be considered by each House meeting in separate session. Deschler Ch 10 § 3.6. After the two Houses have divided, a motion to lay the objection on the table is not in order. Deschler Ch 10 § 3.7; 91–1, Jan. 6, 1969, pp 145–147, 169–172. The controlling statute provides for the procedure to be followed in debate after the two Houses have separated. 3 USC § 17. In one instance, the Senate agreed by unanimous consent to modify the terms of the statute with respect to the division of time for debate. Deschler Ch 10 § 3.8.

If both the House and Senate or either of them, reject the objection, the Presiding Officer of the joint session directs the tellers to record the votes as submitted. 91–1, Jan. 6, 1969, pp 145–147, 169–172.

§ 4. Presidential Disability; Filling Vice Presidential Vacancies

In addition to its responsibilities in ascertaining and counting the electoral votes cast for President and Vice President, Congress has the duty, under the Constitution, of determining disputes as to Presidential disability. U.S. Const. amend. XXV §§ 3, 4. Messages relating to Presidential incapacity are laid before the House. In 1985, the Speaker laid before the House two communications from the President of the United States advising (1) of the President's temporary period of incapacity of discharging the Constitutional powers and duties of the Office of President and directing that the Vice President discharge those duties in his stead and (2) a subsequent Presidential determination of his ability to resume those powers and duties. 99–1, July 15, 1985, p 18955.

The House and Senate also act on the nomination of a Vice President to fill a vacancy. The Constitution provides that in such cases the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses. U.S. Const. amend. XXV § 2. Messages from the President transmitting his nomination of a Vice President under

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this provision are laid before the House by the Speaker. The nomination is referred to the Committee on the Judiciary, which has jurisdiction over matters relating to Presidential succession. 93–1, Oct. 13, 1973, p 34032 (nomination of Gerald R. Ford as Vice President); 93–2, Aug. 20, 1974, p 29366 (nomination of Nelson A. Rockefeller as Vice President). The House and Senate consider the nomination by acting separately on simple resolutions. Deschler Ch 10 § 4.3.